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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1964

No. 566

MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRY-DOCK COMPANY, and GENERAL CONSTRUCTION COMPANY, d/b/a MORRISON - KAISER - PUGET SOUND-GENERAL, *Appellants*,

v.

THE STATE OF WASHINGTON, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the Appellee respectfully moves that this Court enter an order dismissing the appeal on the grounds that this case does not present a substantial federal question.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Is the tax classification adopted by the Washington Legislature which distinguishes between

"public road contractors" and "general contractors" based upon reasonable grounds; or is the classification arbitrary and capricious and therefore discriminatory?

COUNTER-STATEMENT OF THE CASE

In order to construct the State of Washington's Hood Canal Floating Bridge, the Appellants (as successful bidder operating as a joint venture) were required to prefabricate a number of large pontoons[1] and anchor shells[2] in a shipyard and at outfitting docks which were owned by two members of the joint venture. Thereafter these segments of the bridge were towed to the bridge construction site, where they were eventually incorporated into the bridge.

The Washington Supreme Court found that the shipyard and graving dock operations conducted by the Appellants constituted "manufacturing" under provisions of the Washington Business and Occupation Tax. (Opinion: Jurisdictional St., pp. 28-29.)[3]

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[1]The pontoons (St. 6, 11) (Ex. 1, pp. 7-8, 37) were 360 feet long, 50 feet wide, and 14 feet 3⅛ inches in depth. Each pontoon was constructed of concrete reinforced by steel. Much of it was "stressed" during the course of manufacturing. Each pontoon is a honeycomb of watertight compartments with appropriate plumbing facilities for pumping and ballast. (Ex. 1, pp. 7-20.) (St. 10-11.)

[2]The anchor "shells" were immense cubicles constructed of reinforced concrete. They were also to be assembled in dry docks, then floated to the bridge site for preparation for and eventual incorporation within the completed bridge. (St. 18.)

[3]The term "manufacturer" is defined in RCW 82.04.110 as follows:

The tax assessment challenged by the Appellants included an amount of tax measured by Appellants' gross receipts from "manufacturing" at the Seattle dry docks and graving yards.[4]

Having manufactured the pontoons and anchor shells, the Appellants (as a joint venture) were held liable for the Washington Compensating Use Tax (RCW 82.12.010 and RCW 82.12.020), which tax is measured by the value of the articles "used". (See Opinion: Jurisdictional St., pp. 30-32.) The provisions of the Washington State Compensating "Use" Tax are held liable because the articles were manufactured by the taxpayer. If the taxpayer had purchased the pontoons from an independent contractor, a sales tax would have been applicable in an identical amount.[5] The constitutionality of this

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[4] "'Manufacturer' means every person who . . . manufactures . . . for commercial or industrial use from his own materials or ingredients any articles, substances or commodities. . . ."

The term "to manufacture" is defined in RCW 82.04.120 as embracing

". . . all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful substance or article of tangible personal property is produced for sale or commercial or industrial use, and shall include the production or fabrication of special made or custom made articles."

[5] If the member of the joint venture which owns the dry docks had prefabricated the pontoons and anchor shells as an independent contractor rather than as a member of the joint venture, it would obviously have been subject to the same manufacturing tax and in the same amount as here.

[6] Specifications included the standard "Specifications for Road and Bridge Construction" published by the Department of Highways. (Ex. 2.) This portiton of the specifications included a provision that:

"7.01B STATE SALES TAX

"for all contracts for the building, repairing or improving publicly owned streets, roads, etc., used primarily for foot or

tax was established by this Court in *Silas Mason Co. v. Tax Comm. of Washington*, 302 U. S. 186, 82 L. ed. 187, 58 S. Ct. 233 (1937).

The opinion of the Washington Supreme Court also upheld the State's classification of the Appellants as a "public road contractor" and the assessment for a business and occupation tax under the provisions of RCW 82.04.190.* (Opinion: Jurisdictional St., pp. 32-33.)

It is to be noted that Appellants have not and could not argue that they are being subjected to a "double" tax. No contention has ever been made that the rate of taxation is discriminatory. Rather, Appellants have challenged the assessment (a) on the grounds that the State law was misconstrued by the Appellee and (b) alternatively that there is no lawful basis for the classification "public road contractors" as distinguished from "general contractors".

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vehicular traffic as defined in Tax Commission Rule 171, *the Contractor is advised to include in his various unit bid prices, all Washington retail sales taxes to be paid by him on the sales to him of all materials, equipment and supplies, used or consumed in the performance of the contract.* Such sales are not for resale and are taxable against the Contractor. Contractor will *not* be required to collect the retail sales tax on the total contract price from the Department of Highways." (page 26) (Emphasis supplied.)

*The Appellants' "at site" construction activities included construction of approaches, foundations, piers, toll plaza, etc. and incorporation of the prefabricated articles into the final bridge structure. As appellants have noted, the final completion of the job was interrupted by a storm and release of the Appellants from completion of their contract.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

It will be observed that on analysis, Appellants' position must be reduced to the question of whether or not the classifications of the Washington Business and Occupation Tax statutes involved here rest upon some reasonable basis or policy consideration.[1] It must be conceded that the difference between classes of state statutes need not be great. Classification may be permissible if it is reasonably related to some lawful taxing policy of the state, such as greater ease or economy in the administration or collection of a tax, the selection of a fruitful source of revenue with the exemption of sources less promising, or the equalization of the burdens of taxation. If any such reasonable basis for the classification exists, or conceivably may exist, then the circumstance that there is a competition between a commodity or business which is taxed and some business or commodity which is not taxed, does not materially affect the validity of the classification.

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[1]The Appellants, at page 12 of the Jurisdictional Statement, contradict their own formulation of issues by suggesting that this appeal presents an issue as to whether a state is constitutionally required to assess taxes uniformly on all persons engaged in similar activities. The Appellee can of course concede that a state is, in general, required to assess taxes uniformly on all persons engaged in similar activities and submits that the facts of this case indicate that the taxes involved in this case were indeed and in fact assessed uniformly, and are assessed uniformly on all persons engaged in similar activities.

As this Court stated in *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464 (1931):

> "It is not the function of this Court in cases like the present to consider the propriety or justice of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. *Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great.* The decisions of the court make this abundantly clear." (Emphasis supplied.)

It must be obvious that there are necessary distinctions between public road contractors and general contractors. The State Supreme Court found so; the legislature believed it to be true. Public road contractors are engaged in a particular type of contract work which must be performed for public bodies. The latter are engaged in all types of construction, except public road building which is clearly in a class by itself. The legislature could properly exempt general contractors who are retailers from the manufacturer's tax, or requiring public contractors who are not retailers to pay such a tax. These distinctions have developed in the Washington State law as necessary functions of uniformity and as necessary adjuncts to collection policy, the wisdom of which the courts need not question, and should not question, unless it can be said that the taxpayer in question is being subjected to double taxation or unless it can be said as

a matter of law that the classification is arbitrary and capricious.

Beyond any legitimate controversy, the true mark of difference which is the basis of classification in this case does not deprive Appellants of equal protection of the law under the many decisions of this Court setting forth a test for reasonableness of classification in tax cases. *State Board of Tax Commissioners of Indiana v. Jackson*, supra; *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 599, 78 L. ed. 1109 (1934).

No substantial federal question forming a basis for review of a decision of a state supreme court is presented by a contention of invasion of a constitutional right, where the question has been settled by previous decision of this Court. This Court has considered the statutes in question here on many occasions.[8] The fundamental constitutionality of the statutes involved is unquestionable.

By the same token, the decision of the State Court is entirely in harmony with this Court's most recent pronouncements in the state tax field.[9] There are no "interstate commerce" ramifications in this case whatsoever.

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[8] *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325 (1951), cert. den. 342 U. S. 876 (1951); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939); *International Shoe Co. v. Washington*, 326 U. S. 310 (1945); *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951); *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602 (1951); *U. S. Steel Corp. v. State*, 51 Wn. (2d) 224, 316 P. (2d) 1099 (1957), cert. den. 358 U. S. 46 (1958); *Field Enterprises v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010 (1955), aff. per curiam 352 U. S. 806 (1956); *General Motors Corp. v. State*, 12 L. ed. (2d) 430;

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'Contrary to Appellants' weak assertion, or suggestion to the contrary, *Halliburton Oil Well Cementing Co. v. Reily*, 373 U. S. 64 (1963), and *General Motors v. State*, 12 L. ed. (2d) 430, are obviously unrelated to the classification issue here.

CONCLUSION

On the basis of the decision of the State Court and the prior opinions of this Court on classification under the 14th Amendment, no substantial federal question requiring further argument, or one of any public importance, is involved. This Appeal should be dismissed accordingly.

Respectfully submitted,

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